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December 29, 2010

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DEC 29 2010

BY HAND DELIVERY

Federal Communications Commission
Office of the Secretary

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Request for Review of Decision of the Universal Service Administrator
WC Docket No. 06-122 – Redacted for Public Inspection

Dear Ms. Dortch:

XO Communication Services, Inc. ("XOCS"), by its attorneys and in accordance with sections 1.51 and 54.722 of the Federal Communications Commission's rules, 47 C.F.R. §§ 1.51, 54.722, hereby submits an original and 4 copies of the redacted version of its Request for Review of Decision of the Universal Service Administrator ("Request").

Confidential versions of the Request are being submitted under separate cover.

Please contact the undersigned at (202) 342-8612, if you have any questions regarding this filing. Also enclosed is a duplicate of this filing. Kindly date-stamp the duplicate and return it to the courier.

Respectfully submitted,



Steven A. Augustino

Counsel to XO Communication Services, Inc.

Enclosures

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PUBLIC VERSION

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FILED/ACCEPTED

DEC 29 2010

Federal Communications Commission
Office of the Secretary

In the Matter of:)

XO Communication Services, Inc.)
Request for Review)
of Decision of the Universal Service)
Administrator)
_____)

WC Docket No. 06-122

REQUEST FOR REVIEW OF DECISION OF THE
UNIVERSAL SERVICE ADMINISTRATOR

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December 29, 2010

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SUMMARY

For over two years, the Universal Service Administrative Company (“USAC”) conducted an extensive audit of over \$1.4 billion in revenues reported by XO Communication Services, Inc. (“XOCS”) on its 2008 FCC Form 499-A. XOCS made its personnel available for interviews with USAC’s auditors and extensively explained the methodology that the company used to report its revenues on the Form. XOCS explained the many billing systems it employs, including systems used to track the legacy Allegiance Telecom products and services that XOCS provides. Over the course of the audit, USAC discarded the methodology used by XOCS to report its revenues and attempted to construct its own version of the Form 499-A, essentially from the ground up. XOCS cooperated with USAC’s inquiry, supplying answers to many dozens of requests made over the course of a year.

When USAC presented its draft audit findings in December 2009, XOCS embarked upon an extensive effort to re-create the USAC methodology in whole. XOCS’s responses explained the many factual and legal errors made in this methodology, despite the fact that the USAC methodology resulted in nearly the same bottom line assessable revenue as reported by XOCS in the Form 499-A, when common legal interpretations were used.

Ultimately, the audit consumed thousands of person hours within XOCS, and likely many hundreds within USAC as well. The Audit Report itself is 195 pages long, and includes eight proposed audit findings and two “other matters.” At the conclusion of this massive audit, USAC proposed findings that result in a net adjustment of [REDACTED]

[REDACTED] This difference in assessable revenue derives from three strained and

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legally unsound interpretations of the Universal Service Fund (“USF”) reporting rules. As shown below, USAC’s interpretations appear biased toward reclassifying revenue by erecting insurmountable burdens of proof on contributing carriers. XOCS seeks *de novo* review to correct these errors.

If left undisturbed, USAC’s over-reaching would substantially disrupt the FCC’s Universal Service rules and policies. Of course, XOCS would be compelled to pay

[REDACTED] [REDACTED] of extra subsidy to the USF fund, additional payments that it could not recover from customers. But the harm is not limited to XOCS. If USAC’s erroneous treatment of XOCS’ dedicated transport services stands, then state USF funds will be robbed of a critical source of funding for intrastate services.

Similarly, if USAC’s approach to reseller qualification is sustained, wholesale carriers will impose surcharges on resellers who contribute to the Fund, ultimately leading to substantial double payments of USF surcharges by customers. Finally, if USAC’s mistaken reclassification of XOCS’s MTNS information services is not reversed, then the Company will be forced to impose hefty USF surcharges on end users of the service prospectively, and may be placed at a competitive disadvantage with other providers of similar services. Thus, USAC’s over-zealous determinations have real world adverse consequences for XOCS, its customers and state commissions – and the FCC must rectify the error by reversing the USAC audit findings.

Dedicated Transport Services

First, XOCS seeks *de novo* review of the USAC findings in Detailed Audit Findings (“DAF”) “XO Products and Jurisdiction” (“XOCS Products and Jurisdiction DAF”), “ALGX Products and Jurisdiction” (“ALGX Products and Jurisdiction DAF”) and “Non-

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Telecommunications Reporting” (“Non-Telecommunications DAF”) that, with minor exceptions, *all* revenues from a variety of XOCS and legacy Allegiance private line, telecommunications products should have been reported as interstate. XOCS properly concluded, however, that the revenues from many of the physically intrastate non-reseller Dedicated Transport Services circuits it sold should be reported as intrastate. XOCS made this determination not based solely on the geographic endpoints of the circuit, but after considering a variety of other factors as well, including how XOCS configured the circuits at issue and the absence of evidence that the circuits were ever used for interstate purposes, let alone more than 10% of the time.

USAC improperly concluded, contrary to Commission precedent, that Dedicated Transport Services circuits are presumptively interstate and will be treated as such, unless XOCS provided affirmative circuit-specific evidence that 90% or more of the traffic on such circuits was intrastate. Notwithstanding USAC’s characterization, the Commission’s 10% Rule does not establish a presumption that such revenues are interstate until proven otherwise. To the contrary, the purpose and history of the rule support the opposite treatment: where, as here, the circuits in question are physically intrastate *and* are configured by the provider as closed networks *and* there is no affirmative evidence that any of the traffic over such Dedicated Transport Services circuits is interstate, the revenues from such circuits must be treated as *intrastate*. Consequently, XOCS asks the Commission to reject USAC’s reclassification of the revenues from the Dedicated Transport Services circuits which XOCS treated as intrastate.

Reseller Revenue

Second, XOCS seeks *de novo* review of the reclassification of certain reseller revenue received from other telecommunications carriers. As is permitted by the FCC, XOCS did not follow the strict confines of the safe harbor verification procedures outlined in the FCC Form 499-A Instructions, and instead relied in part upon “other reliable proof” to demonstrate that the customers in question could reasonably be expected to contribute to the USF. However, USAC adamantly – and incorrectly – insists that the only acceptable method of verifying a customer’s reseller status is to utilize the Commission’s suggested process in the Form 499-A Instructions. Despite the Commission’s repeated statements that the Form 499-A Instructions are merely guidance, USAC asserts that:

[It] rejects the Carrier’s contention that the Instructions are merely guidance. . . . Indeed, in nearly every instance, the Instructions can be traced to the FCC’s rules or applicable precedent”

...

The FCC has consistently treated the instructions as binding.

This patently incorrect assertion of applicable rules colors USAC’s entire analysis of XOCS’s reseller verification procedures. Consequently, the Commission must act to reign in USAC’s improper positions and affirm that XOCS reasonably determined that the resellers at issue were properly classified by XOCS. XOCS seeks a determination that the particular combination of evidence on which it relied to classify the six specified resellers still in question – which includes certifications and reports from USAC’s quarterly list of 499-Q filers – constitutes

reliable proof supporting XOCS's classification of the revenue. In particular XOCS contests USAC's rejection of the evidence XOCS submitted supporting its reasonable expectation that the reseller customers would contribute directly to the USF.

USAC's actions also inject unnecessary uncertainty into the wholesale market. Ultimately, it will result in unauthorized double recovery of USF contributions as filers are found liable for additional USF contributions - which are appropriately and sometimes actually paid by the filer's customers - simply because the filers are unable to provide documentation meeting USAC's standards. The Commission should grant XOCS's appeal in order to prevent USAC from improperly recovering USF contributions from XOCS rather than its reseller customers who provided certifications of payment to XOCS.

MTNS

Third, XOCS seeks *de novo* review of USAC's reclassification of XOCS's Multi Transport Network Services ("MTNS") as a telecommunications service. USAC's failure to investigate how MTNS service specifically is designed and delivered caused it to err in its audit finding. MTNS is a Multi Protocol Label Switching ("MPLS") - enabled service that qualifies under FCC rules, orders and policies as an "information service" in several different ways. Numerous features of XOCS's MPLS, utilizing protocol processing technology, provide a subscriber with additional, different or restructured information, or involve subscriber interaction with stored information; and wireline broadband Internet access is offered. Under controlling FCC precedent, these facets of XOCS's MPLS qualify the services provided via MPLS - including MTNS - as information services, and the Commission must reverse USAC's finding that MTNS-derived revenue must be reclassified as "telecommunications service."

Other Errors

Finally, XOCS also seeks reversal of USAC's denial of credits it took for reporting errors discovered in 2008, but which relate to revenues reported in Form 499-As for prior years. USAC denied these credits based on the Wireline Competition Bureau's "One Year Downward Adjustment Deadline" Order. The asymmetrical "downward adjustment" limitation relied on is arbitrary and capricious and is subject to three pending challenges before the FCC. This limitation should be reversed, and when the Commission does so, XOCS requests that the disallowed credits on its 2008 Form 499-A be reinstated.

CC Docket No. 06-122

XO Communication Services, Inc. (“XOCS”), by its attorneys, and in accordance with sections 54.719(c), 54.720 and 54.721 of the Federal Communications Commission’s (“Commission” or “FCC”) rules, 47 C.F.R. §§ 54.719(c), 54.720 and 54.721, files this Request for Review of an audit report issued by the Universal Service Administrative Company Board of Directors.¹ The USAC Audit Report was issued to the Company on November 2, 2010.² This appeal is filed within 60 days of issuance of the report. 47 C.F.R. §§ 54.720(a); 1.4(j).

Over the course of 27 months, USAC conducted an extensive audit of over \$1.4 billion in revenues reported by XOCS in its 2008 FCC Form 499-A (the “Form” or “Form 499-”

1 USAC Internal Audit Division Report on the Audit of XO Communication Services, Inc. 2008 Form 499-A Rules Compliance (USAC Audit No. CR2008CP004), dated July 29, 2010, adopted by the USAC Board of Directors, October 26, 2010 (“Audit Report”) (disputed portions attached as Exhibit 1). Due to the extraordinary size of the Audit Report, XOCS provides only those portions of the Audit Report that are implicated by this appeal. The remainder of the Audit Report will be provided to Commission Staff upon request.

² Letter from Colleen Grant, USAC, to Laura Amann, XOCS, dated November 2, 2010 (attached as Exhibit 2).

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A”). At the conclusion of this massive audit, USAC proposed findings that result in a net adjustment of only [REDACTED]

[REDACTED]³ This difference in assessable revenue derives from three strained and legally unsound interpretations of the Universal Service Fund reporting rules as well as application of an arbitrary and capricious order. As shown below, USAC’s interpretations appear biased toward reclassifying revenue as subject to USF contributions by improperly erecting insurmountable burdens of proof on contributing carriers. XOCS seeks *de novo* review to correct these errors. For the reasons discussed herein, the Commission should find that XOCS properly classified these revenues under FCC rules.

I. BACKGROUND

XOCS is one of the largest facilities-based competitive providers of telecommunications and information services in the country. XOCS delivers a comprehensive array of telecommunications solutions to growing businesses, large enterprises, government customers, information service providers, and other telecommunications carriers.

XOCS operates through two business units. Its Business Services unit markets communications solutions to government agencies and business customers ranging in size from small businesses to Fortune 500 companies. XOCS offers these customers managed IP, data and

³ The remainder of the Audit Report involves findings that do not increase the contribution obligation of XOCS, that reduce XOCS’s contribution obligations or that involve changes that XOCS does not contest. XOCS does not appeal these findings. In addition, the Audit Report contains two “Other Matters” in which USAC discusses an item but does not make any recommendation at this time. XOCS does not consider either “Other Matter” to be an “action taken” by the Administrator that “aggrieves” XOCS. *See* 47 C.F.R. § 54.719(c). Accordingly, XOCS understands that it is not necessary to appeal these “Other Matters” at this time.

end-to-end voice communications services. These services include point-to-point dedicated circuits providing a variety of capacities and utilizing a variety of transmission technologies and capabilities. In addition, XOCS offers Internet access, VoIP and managed IP services such as IP-VPN and Multi-Transport Network Services (“MTNS”).

XOCS’s Carrier Services unit delivers a broad range of IP, data and wholesale voice services to local exchange carriers, interexchange carriers, other telecommunications service providers and information service providers (“ISPs”). The Carrier Services group offers customers high-capacity metro and intercity dedicated transport circuits, along with wholesale voice and data origination and termination services. As a result, XOCS has a large base of reseller customers that purchase service for incorporation into their own end user telecommunications services.

A. The USAC Audit

By letter dated July 7, 2008, USAC’s Internal Audit Division initiated an audit of the Form 499-A filed by XOCS in 2008, covering 2007 calendar year revenues. XOCS made its personnel available for interviews with USAC’s auditors and extensively explained the methodology that the company used to report its revenues on the Form. XOCS explained the many billing systems it employs, including systems used to track the legacy Allegiance Telecom (“ALGX”) products and services that XOCS provides.⁴ Over the course of the audit, USAC

⁴ In February 2004, Allegiance Telecom, Inc., Allegiance Telecom Company Worldwide and XO Communications, Inc., predecessor in interest to XOCS’s parent, XO Communications, LLC, entered into an Asset Purchase Agreement whereby XO Communications, Inc. acquired the stock and certain assets of the operating subsidiaries indirectly held by Allegiance Telecom, Inc. *See* In re: Allegiance Telecom, Inc., Debtor-in-Possession, Transferor, And XO Communications, Inc., Transferee, Application for

discarded the methodology used by XOCS to report its revenues and attempted to construct its own version of the Form 499-A, essentially from the ground up. XOCS cooperated with USAC's inquiry, supplying answers to many dozens of requests made over the course of a year or so.

When USAC presented its draft audit findings in December 2009, XOCS embarked upon an extensive effort to re-create the USAC methodology in whole. In order to understand the over 150 specific classifications made by USAC's auditors, XOCS first had to recreate and verify the methodology that USAC's auditors used in determining their findings. XOCS requested these workpapers and received them at a subsequent meeting with USAC.

Once XOCS received the work papers supporting USAC's re-created Form 499-A, XOCS dedicated substantial time from over thirty-five (35) executives and subject matter experts at the Company in addition to over 3,000 total hours by an external accounting and advisory firm and XOCS's outside counsel. Significant effort was made in unwinding USAC's methodology, then applying the appropriate technical analysis to each of USAC's assertions. The results of the analysis and technical responses were then summarized and presented to USAC in a 56 page Power Point presentation. XOCS's responses explained the many factual and legal errors made in USAC's methodology, despite the fact that the USAC methodology resulted in nearly the same bottom line assessable revenue as reported by XOCS in the Form 499-A when common legal interpretations were used.

Consent to a Transfer of Control under Section 214 of the Communications Act of 1934, as Amended, WC Dkt. 05-45 (filed Feb. 20, 2004).

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On November 2, 2010, USAC notified XOCS that its Board had adopted the Audit Report that is the subject of this request for review. The Audit Report itself is 195 pages long, and proposes eight audit findings and two “other matters.” In the Audit Report, USAC proposes findings that result in a very small net adjustment, as a percentage of XOCS’s reported revenue. The difference in assessable revenue derives exclusively from USAC’s interpretations of three Universal Service Fund reporting rules as well as application of an arbitrary and capricious order that XOCS challenges below.

B. The Commission is Required to Conduct a *De Novo* Review of USAC’s Audit Findings

The Commission’s rules require the Commission to review, *de novo*, any request for review of a decision of the USAC Administrator.⁵ Unlike appellate review of FCC decisions, no deference is due to USAC or its conclusions in the underlying audit. The FCC has stated repeatedly that USAC is authorized only to act as an administrator of the USF program. The Commission rules caution that:

The Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress.⁶

As a consequence, USAC is not permitted to exercise discretion or resolve issues for which the rules are unclear. It is instead tasked solely with implementing the rules and directives of the FCC. Consequently, USAC rulings do not have the force of law and are not subject to deference. The Supreme Court, for example, held that *Chevron* deference does not

⁵ 47 C.F.R. § 54.723.

⁶ 47 C.F.R. § 54.702(c).

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apply where “there is no indication that Congress meant to delegate authority [to the agency to issue] rulings with the force of law.”⁷ This principle applies with equal – if not more – force to the actions of USAC, which is prohibited by FCC rules from engaging in policymaking of any kind. For that reason, the Commission’s rules state that the Commission will review *de novo* the questions presented on appeal of USAC audit findings.⁸

Furthermore, this appeal requires the FCC to consider the merits of the questions presented, and not merely to verify that USAC followed appropriate procedures. The Commission has stated that it will not automatically uphold a USAC decision, without review, just because USAC was found to be acting within its authority:

[W]e conclude that USAC decisions, whether considered by the Bureau or the Commission, should be subject to *de novo* review. Accordingly, we decline to adopt USAC’s and SLC’s recommendation that the Commission uphold USAC decisions without considering the merits of the appeal if the Commission finds that USAC has not exceeded its authority and has acted consistently with the Commission’s rules.⁹

Accordingly, it is not sufficient that USAC followed appropriate auditing processes, or that it considered information that was supplied to it. It also is not sufficient that USAC had authority to conduct an audit or conducted the audit consistently with the Commission’s rules. The Commission’s review of the USAC findings on appeal requires it to go beyond the procedures

⁷ *United States v. Mead Corp.*, 533 U.S. 218, 231-32 (2001); *cf.* Earl Bonfield, State Administrative Policy Formulation and the Choice of Lawmaking Methodology, 42 Admin. L. Rev. 121, 134 (Spring 1990) (courts “need not give any deference to [agency interpretive rulemaking] because no discretion to create binding law on that subject was expressly or impliedly delegated to the agency”).

⁸ 47 C.F.R. § 54.723.

⁹ *In re: Changes to the Board of Directors of the National Exchange Carrier Assoc., Inc.; Federal-State Joint Board on Universal Service*, 13 FCC Rcd 25058, ¶ 69 (1998).

used by USAC, and reach the merits of the questions presented. XOCS submits, for example, that the review must do more than ask whether USAC examined appropriate information in classifying revenues of certain resellers. Instead, the Commission must conduct its own evaluation of the information XOCS submitted in support of its classification of certain carrier customers as resellers, and must independently determine whether that information demonstrates a “reasonable expectation” that the carrier customer at issue is a contributor.

In the sections below, XOCS identifies the findings for which it seeks *de novo* review. Each section contains a description of the issue presented for review, the relevant USAC findings, a statement of facts, a summary and a detailed argument. These sections provide the information required by 47 C.F.R. § 54.721(b).

II. ISSUE: DID XOCS CORRECTLY REPORT AS INTRASTATE REVENUE DEDICATED TRANSPORT SERVICE REVENUES FOR PHYSICALLY INTRASTATE CIRCUITS CONFIGURED AS “CLOSED NETWORKS”?

XOCS seeks *de novo* review of USAC findings reclassifying XOCS’s Dedicated Transport Service revenues for physically intrastate circuits that XOCS configured as closed networks. As used herein, “Dedicated Transport Services” refers to XOCS’s suite of point-to-point dedicated private line services. These products include what XOCS markets as Private Line (both Metro Private Line and Long Haul Private Line), SONET, Wave (both Metro Wave and Intercity Wave), Ethernet (both Metro Ethernet and Intercity Ethernet), and, in one case, an Ethernet based product labeled Local Area Network/Wide Area Network (“LAN/WAN”).¹⁰

¹⁰ Dedicated Transport Services do not include XO’s Internet Access products.

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As shown below, USAC reclassified these revenues as interstate because XOCS did not produce evidence that in USAC's view overcame the presumption USAC had adopted that the circuits were interstate. This presumption does not exist in the Commission's rules, and USAC effectively imposed an improper burden of proof on XOCS. Specifically, in this section, XOCS seeks review of the XOCS Products and Jurisdiction DAF, ALGX Products and Jurisdiction DAF and the Non-Telecommunications DAF as they apply to Dedicated Transport Services.¹¹

A. Statement of Facts

Dedicated Transport Services are non-switched point-to-point services offered on a stand alone basis or as part of a private network. In general, XOCS's Dedicated Transport Services are distinguished from each other by the bandwidth requirements and the signaling protocols applied. Thus, for example, basic Private Line service serves speeds of 1.5-45 Mbps, and Wave supports speeds of 2.5 Gbps to 10 Gbps.¹² XOCS acknowledges that Dedicated Transport Services are telecommunications, so there is no dispute whether such services should be treated as telecommunications or information services.

The Dedicated Transport Services at issue primarily support businesses, organizations, institutions, and service providers that need to exchange data and other

¹¹ The XOCS Products and Jurisdiction DAF, ALGX Products and Jurisdiction DAF and the Non-Telecommunications DAF are attached hereto as Exhibits 1.B-D, respectively.

¹² See Declaration of Matthew Alexander, ¶¶8-11, appended to Carrier's Response to XOCS Product and Jurisdiction DAF and attached hereto as Exhibit 3 ("Alexander Declaration").

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communications traffic between two or more discrete locations.¹³ The Dedicated Transport Services at issue also include services used by carrier customers for administrative purposes and services used by wholesale customers that are neither providers of telecommunications nor ISPs. These services were classified by XOCS as “end user” telecommunications services for USF purposes. Consequently, the issue in this appeal is the jurisdictional nature of the services in question, not their classification as telecommunications or non-telecommunications services.

The most common and simple Dedicated Transport Service is a pure point-to-point service that connects two customer locations on, or collocated with, the XOCS network. In addition, multiple locations may be connected with each other through Dedicated Transport Services, typically in a “ring” configuration. “Intercity service” refers to Dedicated Transport Service connections between two end points in different LATAs. “Metro service” describes Dedicated Transport Service arrangements where both ends of the service lie within a given LATA. All Dedicated Transport Services that are the focus of XOCS’s appeal have end points within the same state. They may include either “Intercity service” or “Metro service.”

The Dedicated Transport Services at issue virtually always comprise a closed network. As explained in the *Alexander Declaration*, XOCS provisioned its Dedicated Transport Services for non-carrier customers in virtually all cases as closed communications circuits, in combination with hardware (equipment and connection facilities, fiber optic and/or copper

¹³ *Id.*, ¶12. Other types of Dedicated Transport Services – principally those used by carrier and interconnected voice over Internet protocol (“VoIP”) provider customers as wholesale inputs into their own finished services – are not at issue here. *Id.*, ¶17. Over half of the total Dedicated Transport Services revenues for 2007 were from such customers. These revenues are properly excluded as reseller revenues from XOCS’s USF contribution base for 2007. See Letter to Colleen Grant, USAC from Steve Augustino, Kelley Drye & Warren LLP (Mar. 1, 2010), *attaching* XOCS Response to Detailed Audit Finding No. 3, XO Product and Jurisdiction at 4.

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cables), signaling (DSx, OCx, Ethernet, etc.) and management services to support the non-switched network.¹⁴ XOCS's Dedicated Transport Services are configured to permit communications between the specified customer end points only.

Significantly, XOCS does *not* connect the Dedicated Transport Services at issue (i) to circuits provided by other carriers, (ii) to customer premises equipment ("CPE") that bridges traffic to another location, (iii) to the PSTN, or (iv) to the Internet. XOCS had and has a firm understanding that such Dedicated Transport Services will be used by its business customers for internal communications needs only. To the best of XOCS's knowledge and belief, virtually all traffic transmitted over virtually all such Dedicated Transport Services of its business customers both originate and terminate within the business customers' facilities.¹⁵ Accordingly, where the A and Z points associated with a particular facility are located in different states, the jurisdiction of the traffic on the facility is "interstate," and XOCS has treated the traffic as such. Correspondingly, however – and this is the crux of the disagreement by XOCS with USAC's findings – where the A and Z points associated with a particular business customer's Dedicated Transport Service facility are located within the *same state*, the traffic over the facility cannot, as a physical matter, originate or terminate in a different state; in such

¹⁴ *Id.*, ¶¶12-13. Common types of customers needing to connect multiple locations or multiple local area networks with finished services are financial institutions with multiple locations, hospital and other healthcare systems, federal, state, and local governments and agencies, and national data processing companies. Many medium-to-large businesses need to connect specific locations or to set up a multi-point dedicated network among their business locations. Oftentimes, these networks are closed because of the need for privacy and security of the information being transmitted. Customers of Dedicated Transport Services frequently need time-sensitive applications and high speed data transmissions between points connected by XOCS's Dedicated Transport Services which would be frustrated if the applications or data transmissions were attempted over the public switched telephone network ("PSTN") or other shared, public network. *Id.*, ¶12.

¹⁵ *Id.*, ¶14.

situations, the services provided are “intrastate” in character and XOCS has classified the revenues from such Dedicated Transport Service configurations as intrastate.

B. Summary of Argument

In the XOCS Products and Jurisdiction DAF, USAC concluded, with minor exceptions, that *all* revenues from a variety of XOCS dedicated transport telecommunications products should be treated jurisdictionally as 100% interstate. In brief, USAC concluded that Dedicated Transport Services circuits would be presumed to be interstate circuits, unless XOCS provided evidence that 90% or more of the traffic was intrastate. USAC contends that this presumption is mandated by the Commission’s so-called 10% Rule for determining the jurisdiction of a private line circuit.¹⁶ Contrary to USAC’s interpretation, however, the 10% Rule does not establish a presumption that such revenues are interstate unless proven otherwise. Instead, where the circuits in question are physically intrastate *and* are configured by XOCS as closed networks *and* there is no affirmative evidence that any of the traffic over such Dedicated Transport Services circuits is interstate, the revenues from such circuits must be treated as ***100% intrastate***. Here, XOCS made its determination to treat the revenues as intrastate not based solely on the geographic endpoints of the circuit, as USAC contends, but after considering a variety of other factors as well, including how XOCS configured the circuits at issue and the absence of evidence that the circuits were used for interstate purposes at all, let alone more than 10% of the time.

¹⁶ The 10% Rule is articulated in slightly different although essentially identical ways. The 2008 Form 499-A instructions provide: “*If over ten percent of the traffic carried over a private or WATS line is interstate, then the revenues and costs generated by the entire line are classified as interstate.*” 2008 499-A Instructions III.C.3. (emphasis supplied) See further discussion of the history of the rule below.

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XOCS asks the Commission, accordingly, to reject USAC's reclassification of the revenues from the Dedicated Transport Services circuits which XOCS treated as intrastate.

C. USAC's Findings and Points for Appeal

In the Audit Report, USAC found that all Dedicated Transport Services which represent long distance private lines should be reported on Line 415 and treated as interstate. For local private line revenues reported on Line 406, USAC explained that "because the Carrier could not provide a traffic study or other proof that its private lines carried less than 10% interstate traffic, IAD reclassified this revenue as interstate."¹⁷ Only in the case of Dedicated Transport Services XOCS provided to the Memphis Public School System, which the *Alexander Declaration* provided "[a]s an example," did USAC agree with XOCS and treat the revenues as intrastate.¹⁸ It is USAC's presumption that all private line traffic is interstate applied to the remainder of the physically intrastate Dedicated Transport Services circuits that XOCS challenges in this appeal.

XOCS acknowledges that those Dedicated Transport Services revenues that are not properly treated as reseller revenues should be reported on either Line 406 or 415. With respect to non-reseller revenue reported on Line 415, XOCS agrees with USAC that the services should be treated as jurisdictionally "interstate."

¹⁷ USAC IAD Response to XOCS Product and Jurisdiction DAF at 32, 33.

¹⁸ USAC IAD Response to XOCS Product and Jurisdiction DAF at 25. USAC explained that it relied on the information presented with the *Alexander Declaration* to exempt the revenues from the Memphis Public Schools System. *Id.* That information consisted of one paragraph. *Alexander Declaration*, ¶13.

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There is no dispute that XOCS did not complete traffic studies demonstrating that the traffic on the physically intrastate Dedicated Transport Services circuits at issue is 90% or more intrastate. USAC agreed with XOCS that it would be impractical and could “undermine economic efficiency” for XOCS to conduct traffic studies, and did not persist in alleging the need for such studies in order to treat the revenues as intrastate.¹⁹ In fact, USAC accepted XOCS’ treatment of the revenues from the Dedicated Transport Services sold to the Memphis Public Schools System as intrastate, not on the basis of a traffic study or even a customer certification, but on the basis of statements in the *Alexander Declaration* to the effect that XOCS used Dedicated Transport Services to connect a number of school facilities in a closed network, that the product depended on XOCS-owned facilities and facilities leased from third parties, and that the network did not interface with XOCS POPs, points on the PSTN, or the Internet.²⁰ Although the *Alexander Declaration* gave essentially indistinguishable testimony regarding the other physically intrastate Dedicated Transport Services circuits that XOCS treated as intrastate, although each circuit or customer may not have been named, USAC inexplicably did not accept Mr. Alexander’s statements as similarly persuasive.²¹

Nonetheless, without circuit-specific evidence, the proper way to determine the jurisdictional character of the services provided should involve considering a number of factors, including reference to the physical end points (*i.e.* the A and Z points) of the facilities in

¹⁹ See USAC IAD Response to XOCS Product and Jurisdiction DAF at 28, *quoting Recommended 10% Order*, 4 FCC Rcd 1352, ¶26, n.137.

²⁰ *Alexander Declaration*, ¶13. USAC explained that it relied on the information presented with the *Alexander Declaration* to exempt the revenues from the Memphis Public Schools System. USAC IAD Response to XOCS Product and Jurisdiction DAF at 25.

²¹ See *Alexander Declaration*, ¶14.

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question, the design and functions installed by XOCS (*i.e.*, whether the service was designed and installed as a closed network), the identity and nature of the customer (to the extent either might reveal interstate use on the circuits), and the evidence (if any) that the Dedicated Transport Services is used for interstate purposes more than 10% of the time. Under long-standing Commission precedent, absent a clear basis for treating the revenues as interstate, the presumption under the 10% Rule should be that revenues for Dedicated Transport Services with A and Z points in the same state are *intrastate* revenues, as explained in detail in the next section.

D. USAC Improperly Creates a Presumption, Contrary to Commission Precedent, That Private Line Service Revenues Are Interstate until Proven Otherwise

1. USAC Adopted Unwarranted Presumptions and Applied Them to XOCS

USAC concluded that XOCS had an obligation either to perform traffic studies or to obtain other evidence that the actual traffic on each Dedicated Transport Services circuit is intrastate in order for XOCS to report the revenue as intrastate for USF reporting purposes.²² In short, USAC adopts a presumption that Dedicated Transport Services traffic is interstate. The rule that USAC appears to be applying can be stated as follows:

If *any of* the traffic carried over a private or WATS line *may be* interstate, then the revenues and costs generated by the entire line

²² In its replies to IAD's draft findings, XOCS explained it had no business reason to conduct traffic studies with respect to the Dedicated Transport Services it provided to its business customers. *Alexander Declaration*, ¶16. Because these services are dedicated to a single user on a flat-rate monthly recurring charge basis, there is no operational reason to measure or monitor the traffic on the circuits. Monitoring would require XOCS to place probes onto the circuit that could interrupt a customer's service, detrimentally affecting the quality of service, without any operational gains but increasing its cost. Moreover, to XOCS's knowledge, its competitors do not monitor traffic over comparable services. *Id.*

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are classified as interstate, *unless the carrier has a complete understanding of each of the customer's network topology and design and that understanding allows the carrier to treat 90% or more of the traffic as intrastate.*

Of course, USAC is not permitted to write its own rules. Any modification of the Commission's rules outside of the notice and comment rulemaking requirements of the Administrative Procedure Act would not be sustainable.²³ Yet this is exactly what USAC has done in its audit findings. The USAC Board's adoption of a presumption that revenues from private line services are to be treated as interstate, absent proof from a carrier to the contrary, is wholly inconsistent with Commission precedent, as detailed further below, and the fact that the presumption is rebuttable does not save it. Concomitantly, were such treatment sanctioned, the result would serve to undermine well established state regulatory authority, with adverse consequences for states, the industry, and consumers.

The disagreement between XOCS and USAC is clear. USAC relies on the so-called "10% Rule" which was developed two decades ago as part of the Commission's Part 36 cost separations process to support the presumption that, as a default, revenues from geographically intrastate private lines are to be treated as interstate, absent affirmative evidence to the contrary.²⁴ The 10% Rule was adopted in the 1980s as part of the separations process as a

²³ 5 U.S.C. §§ 552(a), 553.

²⁴ As noted above, *supra*, note 17 and accompanying text, USAC agreed that revenues XOCS received from the Dedicated Transport Services sold to the Memphis Public Schools System should be treated as intrastate. Notably, the evidence that USAC determined was conclusive, the *Alexander Declaration*, is the very same source XOCS has presented to demonstrate that the Dedicated Transport Services at issue were, like the Memphis Public School System circuits, configured as closed networks and without connection to other carriers, ISP, the PSTN, or CPE that bridges traffic. *Compare Alexander Declaration*, ¶13 with *id.* ¶14. USAC fails to explain why Mr. Alexander's